

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JESSIE M. BANKS and U.S. POSTAL SERVICE,
BROAD STREET ANNEX POST OFFICE, Newark, NJ

*Docket No. 00-481; Submitted on the Record;
Issued March 16, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective September 17, 1998 on the grounds that her employment-related disability had ceased; (2) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$4,996.40 from September 17, 1998 to January 1, 1999; and (3) whether the Office properly found that appellant was not without fault in the creation of the overpayment and thereby precluding waiver of recovery.

On April 26, 1995 appellant, then a 32-year-old letter carrier, sustained lumbosacral and cervical sprains and contusion of her left thigh when she fell through a collapsed porch while delivering mail. Appellant stopped work on April 27, 1995, returned to limited duty on June 14, 1995 and resumed her regular duties without restrictions on September 1, 1995.

On January 29, 1996 appellant sustained a recurrence of disability in the form of shoulder, lower back, hip and left side pain. She stopped work on January 30, 1996. On April 13 and December 26, 1996 and October 9, 1997 she accepted limited-duty job offers.

Subsequently, appellant submitted a magnetic resonance imaging (MRI) report, dated October 8, 1996, in which Dr. Michael J. White, a Board-certified diagnostic radiologist, found mild posterior L4-5 and L5-S1 disc bulging with mild impression upon the thecal sac at L4-5.

Appellant also submitted an April 22, 1997 report, in which Dr. Allen S. Glushakow, a Board-certified orthopedic surgeon and internist, noted appellant's complaints and diagnosed lumbosacral radiculitis, significant L4-5 disc bulging and moderate L5-S1 disc bulging. Dr. Glushakow advised that appellant undergo a percutaneous discectomy and requested Office authorization for that procedure. He stated: "Cause related to the accident of April 26, 1995 and an aggravation of an injury occurring on January 29, 1996."

On August 18, 1997 appellant, with a list of questions, statement of accepted facts and the case record, was referred to Dr. Carl F. Mercurio, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Mercurio noted appellant's complaints and a history of her April 26, 1995 employment injury. His physical examination revealed full range of motion of the cervical spine and upper extremities, thoracic scapular, paraneural and left iliac crest pain. Dr. Mercurio stated:

"The above complaints are a result of the accident that took place on April 26, 1995. I feel that this condition is resolved [sic] with time. I feel that no further work up appears indicated, no further treatment appears necessary. Presently I feel the patient is at maximum medical improvement.

"I feel that [appellant] should be returned to normal work capacity over a period of time. This could be facilitated by slowly increasing her capacity over a period of six to eight weeks until she is fully returned to normal. In this period of time, [appellant] should be deconditioned and slowly returned to her normal activities. During that period of time she should limit herself [from] frequent lifting and bending but slowly return to normal activities including work-related activities. I feel [that appellant] can work eight hours a day."

Subsequently, appellant submitted reports from Dr. Glushakow dated October 8 to December 17, 1997. In his October 8, 1997 report, Dr. Glushakow disagreed with Dr. Mercurio's opinion that appellant could return to her regular duties with limitations. Dr. Glushakow stated that appellant's October 8, 1996 MRI report showed mild posterior L4-5 and L5-S1 disc bulging with mild thecal sac bulging; however, "any bulge that impresses upon the thecal sac is not mild." He restricted appellant from lifting more than 10 pounds, sitting longer than one hour at a time and standing longer than one hour per day.

In his October 29, 1997 report, Dr. Glushakow again advised that appellant undergo a percutaneous discectomy and added: "Most importantly, [appellant] has had sciatica, marked lumbar spasm and marked limitation of range of motion in the back which I noted on October 7, 1997."

In a December 17, 1997 addendum to his October 29, 1997 report, Dr. Glushakow stated that on November 13, 1997 his examination revealed lumbosacral tenderness and spasm with marked limitation of range of motion. He stated: "[Appellant's] injury is severe and I still feel [that] a percutaneous discectomy is indicated to relieve her back pain."

Appellant, with a statement of accepted facts and list of questions, was referred to Dr. Ernest D. Abeles, a Board-certified orthopedic surgeon, for a referee examination to resolve the conflict between Drs. Glushakow and Mercurio. In a March 2, 1998 report, Dr. Abeles noted his physical examination findings including measurements, flexion and range of motion. He opined that appellant could not work as a letter carrier and recommended an adequate work-hardening program. He stated: "I do not think that surgery is indicated at this point since her complaints are multiple and are not really directly referable to a condition which will be improved by a percutaneous discectomy."

By decision dated March 9, 1998, the Office accepted that appellant sustained a second recurrence of disability on November 3, 1997 causally related to her April 26, 1995 employment injury. She stopped work on November 4, 1997 and returned to work on September 28, 1998.

On May 29, 1998 appellant, along with a statement of accepted facts and list of questions, was referred to Dr. Robert S. Goldstein, a Board-certified orthopedic surgeon, for an independent medical examination. Dr. Goldstein's June 10, 1998 report included a history of appellant's April 26, 1995 employment-related injury and her complaints. Dr. Goldstein noted his physical examination findings including flexion, extension, and range of motion and diagnostic tests. He stated:

"It is my opinion that this claimant has no objective orthopedic findings to substantiate her present subjective complaints. At this time, [appellant] do[es] not have any current diagnoses that are due to the work-related incident. Her injuries have resolved."

* * *

"The request by Dr. Glushakow for authorization to perform a percutaneous discectomy should not be allowed. The procedure is totally inappropriate. The claimant's MRI revealed only a mild bulging at two levels. There are no objective findings in this claimant to necessitate this kind of surgical procedure.

"The claimant should return to full-duty status. I agree with Dr. Mercurio that she should be able to perform the full duties of her job. She has reached maximum medical improvement. No further treatment is necessary."

By letter dated July 24, 1998, the Office proposed to terminate appellant's benefits on the grounds that the weight of the medical evidence established that she had no continuing disability causally related to her April 26, 1995 employment injury. The Office explained that Dr. Abeles' report was found insufficient to resolve the conflict of medical opinion evidence because he failed to provide rationale for his conclusion that appellant did not need the surgery recommended by Dr. Glushakow. The Office had asked Dr. Abeles to clarify his opinion, but his response lacked an explanation specific to appellant.

Subsequently, appellant submitted an August 28, 1998 report in which Dr. Glushakow noted his physical examination findings and opined that appellant was capable of performing light-duty work commencing September 7, 1998 with the following restrictions: (1) no standing for more than two hours at a time; (2) gradually increased walking from one hour to five hours in bi-weekly increments; (3) no prolonged sitting; (4) no continuous carrying or carrying more than 25 pounds; (5) no continuous lifting or lifting more than 25 pounds; and (6), intermittent climbing. He also set forth a gradually increased work schedule.

By decision dated September 17, 1998, the Office terminated appellant's benefits.

By letter dated September 28, 1998, the Office requested that Dr. Goldstein clarify his June 10, 1998 report by answering a list of questions and completing an enclosed form containing appellant's work restrictions. In response, Dr. Goldstein stated that appellant was

presently able to lift 70 pounds as required and that she did not have permanent work restrictions.

By letter dated October 5, 1998, appellant, through her attorney, requested reconsideration of the Office's September 17, 1998 decision. Appellant argued that Dr. Abeles' March 2 and April 27, 1998 reports demonstrated that she could not work as a letter carrier for more than three to four hours daily and that she needed an adequate work-hardening program. Appellant further argued that Dr. Abeles related her recurrence of disability to her April 25, 1995 employment injury.

By decision dated October 26, 1998, the Office denied reconsideration on the grounds that the evidence submitted to support her request was cumulative, repetitious, irrelevant and immaterial and did not warrant further review.

By letter dated February 3, 1999, the Office advised appellant that it made a preliminary finding that she had been overpaid benefits in the amount of \$6,718.44 and that she was not without fault in creating the overpayment. The Office found that the overpayment occurred because appellant's compensation was terminated by decision dated September 17, 1998, but benefit checks continued through January 1, 1999. The Office further found that appellant was not without fault in creating the overpayment because she should have reasonably been aware that she was not entitled to continuing payments and failed to return them or notify the Office that she continued to receive them.

By letter dated February 19, 1999, appellant, through her attorney, again requested reconsideration of the Office's September 17, 1998 decision terminating her benefits. Appellant argued that Dr. Goldstein's examination was not impartial as he was influenced by the unauthorized examination completed by Dr. Natale V. Bondi, a Board-certified orthopedic surgeon, and Dr. Goldstein's partner. She alleged that Dr. Goldstein's name was substituted for Dr. Bondi's on his May 29, 1998 report.

Appellant submitted a May 29, 1998 progress note in which Dr. Bondi noted his physical examination findings and appellant's complaints. He opined that appellant was not disabled and that surgery was not warranted. Dr. Bondi noted an illegible diagnosis. Appellant also submitted an undated form report in which Dr. Goldstein stated that appellant could work 8 hours a day but could lift no more than 25 pounds.

By decision dated March 23, 1999, the Office denied reconsideration on the grounds that the evidence submitted to support appellant's request was cumulative, repetitious, irrelevant and immaterial. The Office noted that Dr. Goldstein's narrative report constituted the weight of the medical evidence and that appellant's assertion that he was influenced by Dr. Bondi had no probative value. The Office also noted that the record did not contain a report from Dr. Bondi.

By decision dated April 7, 1999, the Office finalized its preliminary finding that appellant was not without fault in creating an overpayment on the grounds that she reasonably should have been aware that she was no longer entitled to the benefits that she received from September 17, 1998 through January 1, 1999.

By letter dated April 27, 1999, appellant, through her attorney, requested reconsideration of the Office's March 23, 1999 decision. She argued that Dr. Goldstein's report was invalid because his partner, Dr. Bondi, had previously examined appellant. She stated that the May 29, 1998 form report signed by Dr. Goldstein was actually completed by Dr. Bondi.

By merit decision dated July 1, 1999, the Office affirmed its September 17, 1998 decision terminating compensation on the grounds that the evidence was insufficient to warrant modification. The Office found that appellant's argument concerning the validity of Dr. Goldstein's report was unconvincing and that his report constituted the weight of the medical evidence.

By letter dated July 29, 1999, appellant, through her attorney, requested reconsideration of the Office's April 7, 1999 decision. Appellant argued that she returned to work on September 28, 1998 not September 17, 1998 and that she cashed only two of the four checks she received after the latter date.

By decision dated September 8, 1999, the Office modified its decision dated April 7, 1999 and found an overpayment of compensation in the amount of \$4,996.40. The Office noted that it received a returned covering November 8 to December 5, 1998 in the amount of \$1,722.04 and adjusted the amount of appellant's overpayment accordingly.

The Board finds that the Office properly terminated appellant's benefits effective September 17, 1998 on the grounds that her employment-related disability had ceased.

Once the Office accepts a claim, it has the burden of justifying a subsequent modification or termination of benefits. After it has determined that an employee has a disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.² Furthermore, in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³

In this case, the Office accepted that appellant sustained employment-related lumbosacral and cervical sprains and left thigh contusions on April 26, 1995 and recurrences of disability on January 29, 1996 and November 3, 1997. The Office paid appropriate disability compensation before terminating appellant's compensation effective September 17, 1998. The weight of the medical evidence on the issue of whether appellant had residuals of her April 26, 1995 employment injury rests with the opinion of Dr. Goldstein, the independent medical examiner for

¹ See *Jacquelyn L. Oliver*, 48 ECAB 232, 235 (1996); *Harold S. McGough*, 36 ECAB 332 (1984).

² *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

³ See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

the Office. His comprehensive reports, dated June 10 and October 6, 1998, are sufficiently well rationalized to deserve the special weight accorded to referee physicians.⁴

In his June 10, 1998 report, Dr. Goldstein stated that he found no objective orthopedic evidence substantiating appellant's complaints related to her work-related injury. He also stated that a percutaneous discectomy was inappropriate and that appellant could fully perform her job duties.

The numerous reports from Dr. Glushakow are insufficient to overcome the special weight accorded to Dr. Goldstein's opinion because they do not contain a rationalized opinion relating appellant's alleged disability after September 17, 1998 to her April 26, 1995 employment injury. While Dr. Glushakow diagnosed lumbosacral radiculitis and significant L4-S1 disc bulging and recommended a percutaneous discectomy, none of his reports explains how these conditions resulted from the accepted work injury in 1995.

Similarly, Dr. Abeles's March 2, 1998 report stated that appellant could not work as a letter carrier and he recommended a work-hardening program, but he did not relate appellant's condition or inability to work to her April 26, 1995 employment injury. Furthermore, Dr. Abeles agreed that surgery was unnecessary as appellant's multiple complaints would not be improved by a percutaneous discectomy.

Appellant's attorney argues that Dr. Bondi's examination was unauthorized and, therefore, Dr. Goldstein's subsequent examination was improper.

As the Office explained in its June 2, 1998 letter to appellant, she was scheduled for another examination with Dr. Goldstein because Dr. Bondi was not authorized to examine her on May 29, 1998. Apologizing for the inconvenience, the Office pointed out that the May 29, 1998 examination was not valid and that the physicians' office had made the mistake.⁵ The Board finds no evidence in the record indicating that Dr. Goldstein's reports were improperly influenced by his partner, Dr. Bondi. As the medical evidence of record is insufficient to overcome the special weight accorded to Dr. Goldstein's reports, the Office met its burden of proof to terminate appellant's compensation benefits on September 17, 1998.

The Board further finds that the Office improperly determined that appellant received an overpayment of compensation in the amount of \$4,996.40 for the period September 17, 1998 to January 1, 1999.

In this case, appellant, by her own admission, cashed two of the four compensation checks she received during the period September 17, 1998 to January 1, 1999. The Office, in its September 8, 1999 decision, noted that it received an uncashed check in the amount of \$1,722.04 for the period November 8 to December 5, 1998.

⁴ *Id.*

⁵ The record contains a handwritten note dated May 29, 1998 and signed by Dr. Bondi, indicating that appellant is not disabled. An OWCP-5 disability form shows a whited-out area in the signature block, but is signed by Dr. Goldstein. Further, Dr. Goldstein's report confirms that he based his conclusions on the results of his own examination on June 10, 1998.

On appeal appellant argues that she did not cash the fourth check for the period December 6, 1998 to January 1, 1999 and that the amount of the overpayment should be reduced accordingly.

The Board finds that the record contains no evidence that appellant cashed the \$1,722.04 check covering December 6, 1998 through January 1, 1999. A memorandum in the record states that information received from the Department of the Treasury indicated that “an ACPS check was cancelled on August 13, 1999,” but the document does not identify this cancelled check as appellant’s or the date it was issued. Inasmuch as the Office has failed to establish that appellant cashed the check covering disability from December 6 through January 1, 1999, the Board will set aside the September 8, 1999 decision regarding the amount of the overpayment and remand the case for the Office to determine the correct amount.

The Board further finds that appellant was not “without fault” in the creation of the overpayment and, therefore, it was not subject to waiver.

Section 8129(b) of the Act provides, “Adjustment of recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of [the Act] or would be against equity and good conscience.”⁶ Accordingly, no waiver of an overpayment is possible if the claimant is with fault in helping to create the overpayment.

In determining whether an individual is with fault, section 10.320(b) of the Office’s regulations provides in relevant part:

“An individual is with fault in the creation of an overpayment who:

- (1) Made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment, which he or she knew or should have known to be incorrect. (This provision only applies to the overpaid individual)”⁷

In this case, appellant knew or should have known that the compensation payments that she received after September 17, 1998 were in error because the Office issued its September 17, 1998 decision terminating her benefits effective that day. Therefore, appellant is not “without fault” in the creation of the overpayment from September 17 to November 8, 1998 and is not entitled to seek waiver of recovery of that amount of overpayment.

⁶ 5 U.S.C. § 8129(b).

⁷ 20 C.F.R. § 10.433(a).

The July 1 and March 23, 1999 and October 26, 1998 decisions of the Office of Workers' Compensation Programs are hereby affirmed; the September 8, 1999 decision is set aside and the case is remanded for further development consistent with this opinion.

Dated, Washington, DC
March 16, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member